

BEFORE LINDA McCULLOCH, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,
STATE OF MONTANA

ROBERT OPIE and RITA OPIE,)	
)	
Appellants,)	OSPI 301-05
)	
vs.)	DECISION AND ORDER
)	
BOARD OF TRUSTEES, SCHOOL)	
)	
DISTRICT # 2)	
)	
Respondent.)	
)	
)	

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following Decision and Order.

DECISION AND ORDER

The June 10, 2005 Order on Motion to Dismiss by A.J. Micheletti, Yellowstone County Superintendent of Schools dismissing the appeal for lack of jurisdiction is hereby affirmed.

PROCEDURAL HISTORY

This is an appeal by Robert and Rita Opie (hereinafter "Opies") of the Order on Motion to Dismiss dated June 10, 2005 issued by A.J. Micheletti, Yellowstone County Superintendent of Schools.

Respondent, the Board of Trustees of Billings School District #2 (hereinafter "District") issued a decision on February 21, 2005 affirming Superintendent Svec's response to four Policy 1700 complaints. Appellants appealed the District's decision to the Yellowstone County

1 Superintendent of Schools. The District filed a Motion to Dismiss alleging that the County
2 Superintendent did not have jurisdiction to consider the subject appeal. The parties submitted
3 briefs and the Yellowstone County Superintendent issued an Order on Motion to Dismiss on
4 June 10, 2005 affirming the District's decision. The Appellants filed a letter appealing that Order
5 with the State Superintendent of Public Instruction on July 8, 2005.
6

7 8 **ISSUES ON APPEAL**

9 The issue on appeal is: Whether the County Superintendent has jurisdiction over the
10 issues presented on appeal?

11 **STANDARD OF REVIEW**

12 The State Superintendent's review of a county superintendent's decision is based on the
13 standard of review of administrative decisions established by the Montana Legislature in Mont.
14 Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125.
15 Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are
16 reviewed to determine if the correct standard of law was applied. *Harris v. Trustees, Cascade*
17 *County School Districts No. 6 and F, and Nancy Keenan*, 241 Mont. 274, 277, 786 P.2d 1164,
18 1166 (1990) and *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, at 474, 803 P.2d 601, 603
19 (1990).
20

21 The State Superintendent may reverse or modify the county superintendent's decision if
22 substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions
23 of law and order are (a) in violation of constitutional or statutory provisions; (b) in excess of the
24 statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e)
25 clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;

1 (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise
2 of discretion; or (g) affected because findings of fact upon issues essential to the decision were
3 not made although requested. Admin. R. Mont. 10.6.125(4).
4

5 **FINDINGS OF FACT**

6 1. The issue at the crux of all of the complaints is the issuance of a grade to Opies'
7 daughter during the first semester of 2001. Opies allege that the grade was improperly
8 calculated.
9

10 2. The Opies filed a complaint under District policy 3049 and FERPA (34 CFR Sec.
11 99.21) asking that the grade be changed and the record amended accordingly.

12 3. The District held a FERPA hearing presided over by Michelle Smith, Hearing
13 Officer.

14 4. The grade at issue was not changed and the Opies filed an appeal of the decision
15 with District Superintendent Jo Swain.

16 5. Superintendent Swain affirmed the Hearing Officer's decision.

17 6. The District's Board of Trustees agreed to meet with the Opies to hear their
18 concerns over the grade issue.
19

20 7. The Opies continued in their efforts to persuade the District to change their
21 daughter's grade.

22 8. In February of 2004 the District and Opies met with Dennis Paxinos (Yellowstone
23 County Attorney) in an attempt to mediate a resolution to the problem. A verbal agreement was
24 apparently reached, but not reduced to writing. The parties disagree as to the terms of the verbal
25 agreement.

1 9. The Opies filed a complaint against the District with the U.S. Department of
2 Education in connection with the FERPA hearing.

3 10. One of the items alleged by Opies to have been in the verbal agreement was that
4 the District would send a letter to the U.S. Department of Education.

5 11. The District alleges that a letter was sent to the U.S. Department of Education in
6 July of 2004 (Opies received a copy). Opies discovered on October 4, 2004 that the U.S.
7 Department of Education had no record of receiving a letter from the District. Opies allege that
8 this is the date that should be used to calculate the 30 day time limit provided for in Policy 1700.
9

10 12. Opies filed four complaints with the District under its Policy 1700 on October 18,
11 2004. The complaints alleged various concerns and complaints about District Superintendent
12 Rod Svee, Sky View High School Principal Bob Whalen, FERPA hearing officer Michelle
13 Smith, and Sky View High School teacher Barb Fettig.

14 13. Superintendent Rod Svee investigated the complaints and determined that they
15 had not been filed within the 30 day time period as provided in Policy 1700. He issued a written
16 decision addressed to Opies on November 11, 2004.

17 14. Opies appealed this decision to the District's board of trustees.

18 15. Pursuant to Policy 1700 the District convened a panel of 3 members to hear the
19 Opies' appeal of Superintendent Svee's decision in this matter. The hearing was held February
20 18, 2005.
21

22 16. The District, by letter dated February 21, 2005 upheld the decision of
23 Superintendent Svee.

24 17. The County Superintendent of Schools upheld the District's dismissal of the
25 complaints based on lack of timeliness and jurisdiction.

CONCLUSIONS OF LAW

The first duty of the County Superintendent, upon receiving an appeal from a decision of a school district's board of trustees is to determine if the appeal is a contested case and whether or not he/she has jurisdiction over the issues on appeal. ARM 10.6.104 County Superintendent Micheletti acknowledges in his Order for Response dated March 23, 2005 that he "is not certain the letter meets the formal requirements for a notice of appeal."

ARM 10.6.105(2) provides:

"(2) When a party appeals to the county superintendent, the notice of appeal must include:

- (c) a clear and concise statement of the matters asserted;
- (d) a statement setting forth the basis for the contested case that the county superintendent has proper jurisdiction; and
- (e) references to the particular sections of the statutes and rules involved."

The letter filed by Opies with the Yellowstone County Superintendent on March 17, 2005 does not contain the items required of a notice of appeal pursuant to ARM 10.6.105(2)(c), (d) and (e). Nevertheless the County Superintendent apparently determined that he would accept the appeal and allow the District to argue a lack of jurisdiction if they felt one existed.

The District filed a Motion to Dismiss alleging that the County Superintendent did not have jurisdiction based on subject matter and timeliness. Following submission of briefs and additional information including the complaints filed by Opies, the County Superintendent dismissed the appeal finding that the Opies "failed to file an appeal during that 30 day period [beginning on the date the District rendered its final decision on the grade in the summer of 2002]" and therefore the appeal was barred by the statute of limitations. The County Superintendent also found that "[w]ithout some statutory source of authority the County Superintendent of Schools does not have jurisdiction over the appeal."

1 The State Superintendent agrees that the appeal should be dismissed and finds that
2 subject matter jurisdiction is the threshold issue and therefore will not address the timeliness of
3 filing the Policy 1700 complaints.

4 In order to determine if the County Superintendent has jurisdiction to hear a particular
5 case the County Superintendent must determine whether or not the Opies' case is a "contested
6 case" under Montana law. Montana administrative rule defines "contested case" as "any
7 proceeding in which a determination of legal rights, duties or privileges of a party is required by
8 law to be made after an opportunity for hearing." ARM 10.6.102 The State Superintendent held
9 in *Schultz v. Arlee School District #8-J*, OSPI 256-95 that "for a County Superintendent to have
10 jurisdiction to hold a hearing a petitioner must have a constitutional, statutory or case law grant
11 of a hearing right."
12

13 The issue on appeal also must be an issue relating to a statute in Title 20, Montana Code
14 Annotated. MCA 20-3-210 provides in relevant part:

15 (1) ... The county superintendent shall hear and decide all controversies arising under:

16 ***

17 (b) any other provision of this title for which a procedure for resolving controversies in
18 not expressly prescribed." (Emphasis added)

19 The State Superintendent held in *Ronan School District v. Dupuis*, OSPI 296-03 that
20 there was no basis in statutory, constitutional or case law to warrant an appeal to the County
21 Superintendent citing:

22 "County superintendents also do not have the jurisdiction to rule on all matters of
23 law that somehow may be related to schools. County superintendents have the power to
24 conduct administrative hearings to issue findings of fact and conclusions of law in areas
25 that are within their field of expertise under Title 20. They do not have the jurisdiction to
rule on questions of law outside of Title 20. For example, they cannot hear tort claims
and they do not hear actions arising out of the Montana Human Rights Act." *Brott v.
School District No. 9, Browning Public Schools*, OSPI No. 234-94.

Opies have not identified any constitutional, statutory or case law grant of a right to a

1 hearing in this matter that the County Superintendent has jurisdiction over and the State
2 Superintendent finds none.

3 Issues involving a dispute over a student's records, in this instance, grades, are governed
4 by the Federal Family Educational Rights and Privacy Act (FERPA) 20 USCA 1232g. FERPA
5 provides at 20 USCA 1232g(a)(2) that parents or eligible students (age 18):

6 "...are provided an opportunity for a hearing by [the district] in accordance with
7 regulations of the Secretary, to challenge the content of such student's education
8 records, in order to insure that the records are not inaccurate, misleading, or
9 otherwise in violation of the privacy rights of students, and to provide an
10 opportunity for the correction or deletion of any such inaccurate, misleading or
otherwise inappropriate data contained therein and to insert into such records a
written explanation of the parents respecting the content of such records.

11 The Opies acknowledge that they were given a FERPA hearing regarding the contested
12 grade. Pursuant to District Policy 3049 a hearing officer was appointed and a hearing held. The
13 Hearing Officer determined that the grade was accurate. Pursuant to District Policy 3049 the
14 Opies appealed that decision to District Superintendent Jo Swain. She affirmed the decision of
15 the Hearing Officer on June 20, 2002. The policy does not provide a right of appeal of that
16 decision.

17 The Opies demanded that their concerns be heard by the Trustees. The Board agreed to
18 hear their concerns and did so in a closed session. The Opies were notified that there was no
19 right of appeal from Superintendent Swain's decision to affirm the Hearing Officer's decision
20 following the FERPA hearing. (Superintendent Swain's July 29, 2002 letter) The Board was
21 not required to issue a decision as a result of this meeting with the Opies because there was no
22 issue to be decided. The grade issue had been fully determined pursuant to the school's policy
23 and the Opies concerns regarding teacher performance were not subject to a decision by the
24 board as a result of that meeting.
25

1 At that point the only option that Opies had regarding the grade issue was to file a
2 complaint with the Family Policy Compliance Office. FERPA provides for the filing of such a
3 complaint if the complainant believes that a violation of FERPA has occurred. This complaint
4 must be filed within 180 days of the alleged violation. 34 CFR 99.64

5 The Opies acknowledge that they filed a complaint with the Family Policy Compliance
6 Office (FPCO), but no filing date is given or information regarding the outcome. If the FPCO
7 finds that the District has violated FERPA, the District is given an opportunity to come into
8 compliance. If the District fails to comply, the Department of Education has the option of
9 withholding all federal funding for the school.
10

11 The Opies allege many irregularities with respect to lack of due process, the hearing
12 officer and the conduct of the hearing. Questions and disputes regarding procedures followed
13 under FERPA belong in the venue of the FPCO of the U.S. Department of Education.

14 A student does not have a constitutional or statutory right to a hearing in connection with
15 a dispute over a grade. Receiving a particular grade for school coursework is not a right
16 protected by the constitution, state statute or case law and therefore is not an issue that is subject
17 to the jurisdiction of the County Superintendent. Further the County Superintendent does not
18 have jurisdiction over federal legislation and cannot issue a decision relative to the conduct of
19 the FERPA hearing.
20

21 The appeal, as it pertains to the complaint filed by the Opies against FERPA hearing
22 officer, Michelle Smith, is dismissed due to lack of jurisdiction over Ms. Smith or the FERPA
23 hearing process.

24 The complaints filed by Opies against Superintendent Svec, Principal Whalen, and Ms.
25 Fettig contain various allegations of failing to honor the verbal agreement, lack of competency,

1 improper actions, blackmail, slander, perjury, false statements, holding the Opie family as
2 psychological and emotional hostages, jeopardizing their daughter's education, causing
3 emotional harm to the Opie family, causing harm to all of their children's education, intimidation
4 and threats, abusive behavior, grade tampering, conspiracy to cover up grade tampering,
5 harassment, intentional destruction of records, and retaliation. These allegations are under
6 contract, tort or criminal law and are not actions which the County Superintendent has
7 jurisdiction to hear. *Brott v. School District No. 9, Browning Public Schools*, OSPI No. 234-94.

8
9 Opies also allege violation of privacy rights in connection with other students' records.
10 Again, these would be FERPA issues and only the parents of the students whose rights were
11 allegedly violated would have standing to file a complaint with the FPCO regarding disclosure of
12 their child's records.

13 Opies suggested resolution for these complaints is investigation of the complaints by a
14 private investigator, termination of the District's legal counsel, reprimand or termination of these
15 individuals from employment with the district, requirement for use of a specific grading program
16 by each teacher, and direction to the board to adopt certain grading policies.

17 There is no constitutional, statutory or case law authority granting the County
18 Superintendent the right to hear issues involving a parent's dispute with a district over
19 disciplining/retaining district personnel. The County Superintendent does not have the authority
20 to order a district to fire or reprimand district employees. Only the District's board of trustees
21 has control over the hiring and firing of district personnel. 20-3-324(1) and 20-4-401, MCA.
22 Nor does the County Superintendent have the authority to determine grading systems or to direct
23 the District to adopt certain policies.
24

25 The appeal as it regards the complaints against Superintendent Svec, Principal Whalen

1 and Ms. Fettig is dismissed due to lack of jurisdiction.

2 **DECISION AND ORDER**

3 The June 10, 2005 Order on Motion to Dismiss by A.J. Micheletti, Yellowstone County
4 Superintendent of Schools dismissing the appeal for lack of jurisdiction is hereby affirmed.

5 Dated this 11th day of November, 2005.

6
7 /s/ Linda McCulloch
8 Linda McCulloch
9 State Superintendent of Public Instruction

10 **CERTIFICATE OF SERVICE**

11 THIS IS TO CERTIFY that on this 11th day of November, 2005, I caused a true and
12 exact copy of the foregoing DECISION AND ORDER to be mailed, postage prepaid, to the
13 following:

14 Robert and Rita Opie
15 2027 Andrews Drive
16 Billings MT 59105

17 Mary E. Duncan
18 FELT, MARTIN, FRAZIER, JACOBS
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20 PO Box 2558
21 Billings MT 59103-2558

22 A.J. Micheletti
23 Yellowstone County Superintendent
24 PO Box 35022
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26 /s/ Catherine K. Warhank
27 CATHERINE K. WARHANK
28 Chief Legal Counsel